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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10

11 CARL A. IMPINK,

12 Plaintiff,

13 v.

14 BANK OF AMERICA, N.A.; BAC HOME
15 LOANS SERVICING, L.P.; and DOES 1-
16 10,

Defendant.

Case No. 11cv00104 BTM (WMc)

**ORDER GRANTING MOTION TO
DISMISS AND DENYING MOTION
TO CONTINUE**

17 Defendants Bank of America, N.A. (erroneously sued as “Bank of America Attn:
18 Document Services [Foreclosure]”) and BAC Home Loans Servicing, L.P. (“BACHLS”) have
19 filed a motion to dismiss Plaintiff’s Amended Complaint. For the reasons set forth herein, the
20 Court GRANTS the motion to dismiss, and DENIES Plaintiff’s request for a continuance.
21

22 **BACKGROUND**
23

24 In September 2005, Plaintiff borrowed \$400,000 from Universal Savings Bank, F.A.,
25 a federal savings bank. (RJN (Doc. 30-2), Ex. A.) According to the terms of the note, the
26 loan’s interest rate of 5.25% was fixed for three years, after which the interest rate would
27 adjust annually based on an Index plus 2.25%. (*Id.*)
28 //

1 Plaintiff's loan was secured by a deed of trust on property located at 13970 Olivevista
2 Drive, Jamul, California 91935 (the "Property"). (RJN Ex. E.) The deed of trust names
3 MERS as the beneficiary. (Id.)

4 On August 18, 2009, a Notice of Default was recorded against the Property by
5 ReconTrust Company, N.A., "as agent for the Beneficiary." (RJN Ex. P.)

6 On April 1, 2010, MERS recorded an assignment by which MERS transferred its
7 beneficial interest in the Deed of Trust to BACHLS. (RJN Exs. P, Q.)

8 Plaintiff commenced this matter on January 19, 2011, by filing a complaint (the
9 "Complaint") alleging sixteen separate causes of action based on various alleged
10 misstatements and misrepresentations relating to the underlying loan. On September 6,
11 2011, the Court entered an order (Doc. 23) dismissing each of Plaintiff's sixteen causes of
12 action for failure to state a claim.

13 14 STANDARD

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16 Under Fed. R. Civ. P. 8(a)(2), the plaintiff is required only to set forth a "short and plain
17 statement" of the claim showing that plaintiff is entitled to relief and giving the defendant fair
18 notice of what the claim is and the grounds upon which it rests. Conley v. Gibson, 355 U.S.
19 41, 47 (1957). A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should
20 be granted only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient
21 facts to support a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696,
22 699 (9th Cir. 1988).

23 When reviewing a motion to dismiss, the allegations of material fact in plaintiff's
24 complaint are taken as true and construed in the light most favorable to the plaintiff. See
25 Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). Although detailed
26 factual allegations are not required, factual allegations "must be enough to raise a right to
27 relief above the speculative level." Bell Atlantic v. Twombly, 550 U.S. 544, 127 S.Ct. 1955,
28 1965 (2007). "A plaintiff's obligation to prove the 'grounds' of his 'entitle[ment] to relief'

requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Id. “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not show[n] that the pleader is entitled to relief.” Ashcroft v. Iqbal, ___ U.S. ___, 129 S.Ct. 1937, 1950 (2009) (internal quotation marks omitted). A complaint filed by a pro se plaintiff is held to less stringent standards than pleadings drafted by attorneys. Haines v. Kerner, 404 U.S. 519, 520-21 (1972).

DISCUSSION

Plaintiff’s amended complaint does nothing to cure the multitude of defects identified by the Court in the September 6, 2011 order dismissing the original Complaint. The entire substantive content of Plaintiff’s Amended Complaint is set forth in two numbered paragraphs, which state (verbatim):

1. Amended First Cause of Action- Plaintiff asserts that the lender offered a “predatory loan” with an expectation that the Plaintiff would be forced into a default when the ARM elements of the loan were executed by the lender. The profit potential to the purchasers of said loan fully expected to realize the increased income stream of the ARM loan at the expense of the Plaintiff. Such “bait and switch” tactics of the mortgage broker and lender are exacerbated by the courts acceptance of such practices as a mere “doing business” normally, when it is an obvious perversion of a well established process. **By not providing ARM disclosures as required by law**, the mortgage broker and lender have conspired to defraud the Plaintiff of his property, which would have been obvious to any knowledgeable buyer. Thus, “elder abuse” applies to this Plaintiff. The causes of action of the original complaint are included herein by reference.
2. Amended Second Cause of Action- Plaintiff asserts that the Defendant/lender is pursuing and unjust enrichment in violation of commercial law. Plaintiff asks the court to set aside the sale, cancel the trustee’s deed, and award the Plaintiff quiet title to said property.

(Amended Complaint, Doc. 28, at 2 (emphasis in original).)

The first paragraph adds nothing to the allegations in the original Complaint. The Court has already dismissed Plaintiff’s bald allegations of “elder abuse” (see 6 Sept. 2011 Order at 4), “predatory lending” (see id. at 7), and failure to provide ARM (adjustable-rate

1 mortgage) disclosures (see id. at 4). The Court also noted that any Truth in Lending Act
2 (“TILA”) claims were barred by TILA’s statute of limitations, and that Plaintiff failed to plead
3 “any facts suggesting that the doctrine of equitable tolling is applicable here.” (Id.) Plaintiff
4 has not, in the paragraphs above, set forth any basis for granting him equitable tolling with
5 respect to the TILA statute of limitations. Lastly, to the extent any of Plaintiff’s other
6 conclusory statements in the first paragraph (e.g. allegations of “bait and switch” tactics) can
7 be read to allege fraud, such statements fail to meet the heightened pleading standard for
8 fraud claims under Federal Rule of Civil Procedure 9(b).

9 The second paragraph adds a claim for “unjust enrichment in violation of commercial
10 law.” In California, there is no cause of action for “unjust enrichment”; rather, unjust
11 enrichment is an injury, for which the cause of action is restitution. See Dinosaur
12 Development, Inc. v. White, 216 Cal. App. 3d 1310, 1314 (1st Dist. 1989) (“[P]laintiff is in
13 essence pleading its entitlement to restitution. Unjust enrichment, the term used by plaintiff,
14 is synonymous with restitution.”). Under California law, “one who confers benefits on another
15 *officiously*, i.e., by unjustified interference in the other’s affairs, is not entitled to restitution.
16 It must ordinarily appear that the benefits were conferred by *mistake, fraud, coercion or*
17 *request*; otherwise, though there is enrichment, it is not unjust.” Id. at 1316 (emphasis in
18 original). Plaintiff has failed to allege sufficiently any facts indicating an unjust enrichment,
19 such that Plaintiff could raise a colorable claim for restitution.

20 Plaintiff’s Amended Complaint also requests that the Court take judicial notice of an
21 attached document, identified by Plaintiff as a “common law lien” on the Property dated
22 November 4, 2010. Plaintiff nowhere explains the purpose of this request for judicial notice.
23 Without even addressing the issue of whether the Court may take judicial notice of the
24 contents of the “common law lien,” the Court finds that Plaintiff has entirely failed to allege
25 any legal theory in connection to his request for judicial notice. The request does nothing to
26 save the Amended Complaint from dismissal.

27 Lastly, also pending before the Court is Plaintiff’s letter to the Court requesting a
28 continuance--for an unknown deadline--of 60 days. Plaintiff dated this letter after filing his

1 response to Defendants' motion to dismiss, and thus the Court assumes Plaintiff seeks a
2 continuance of the date on which the Court takes the motion to dismiss under consideration.
3 As this motion was taken under consideration more than 60 days ago, the Court DENIES
4 Plaintiff's request for a continuance (Doc. 36) as moot.

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6 **CONCLUSION**

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8 For the reasons set forth above, the Court hereby GRANTS Defendants' motion to
9 dismiss (Doc. 30), and DISMISSES the Amended Complaint. There is no indication that
10 Plaintiff can successfully plead a valid cause of action. Therefore, leave to amend would be
11 futile. The clerk shall enter a final judgment dismissing the Amended Complaint.

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13 **IT IS SO ORDERED.**

14 DATED: July 23, 2012

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16 BARRY TED MOSKOWITZ, Chief Judge
17 United States District Court
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